BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD

CENTRAL PUGET SOUND REGION

STATE OF WASHINGTON

CITY of SHORELINE, TOWN of WOODWAY, and SAVE RICHMOND BEACH, et al.,

Petitioners,

v.

SNOHOMISH COUNTY,

Respondent,

and

BSRE Point Wells, LLC,

Intervenor,

and

The Tulalip Tribes,

Amicus Curiae.

Coordinated Case Nos.

09-3-0013c and 10-3-0011c

(*Shoreline III and Shoreline IV)*

ORDER ON MOTIONS FOR RECONSIDERATION

This matter came before the Board on motions for reconsideration of the Final Decision and Order issued April 25, 2011 (FDO). Petitioners City of Shoreline and Save Richmond Beach moved for reconsideration of the Board's denial of Legal Issue 3 in the *Shoreline IV* case.[1] Respondent Snohomish County moved for reconsideration of the Board's ruling granting

[1] Shoreline's and Save Richmond Beach's Consolidated Motion for Reconsideration (Shoreline IV), May 5, 2011.

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Shoreline standing to raise the issue of lack of SEPA alternatives.[2] The County also submitted a letter identifying clerical errors in the Final Decision and Order.[3]

WAC 242-02-832(2) provides:

> A motion for reconsideration shall be based on at least one of the following grounds:
> (a) Errors of procedure or misinterpretation of fact or law, material to the party seeking reconsideration;
> (b) Irregularity in the hearing before the board by which such party was prevented from having a fair hearing; or
> (c) Clerical mistakes in the final decision and order.

Petitioners' Motion

Petitioners City of Shoreline and Save Richmond Beach move for reconsideration of the Board's dismissal of Legal Issue 3. Legal Issue 3 challenged the development regulations adopted for Point Wells, alleging the County violated RCW 36.70A.040(4) and RCW 36.70A.120 by adopting development regulations inconsistent with its comprehensive plan.

The FDO dismissed Legal Issue 3 on two bases:

- Citation to subsection (4) of RCW 36.70A.040, when the applicable subsection is (3), and
- Failure to brief RCW 36.70A.120.[4]

Petitioners assert dismissal was an "error of procedure or misinterpretation of fact or law."[5] Petitioners point out three subsections of RCW 36.70A.040 contain identical language, requiring that a county "shall adopt … development regulations that are consistent with and implement the comprehensive plan." As subsection (3) and (4) "use the exact same words to spell out the specific duty in question," Petitioners argue, dismissal for the technical error

[2] Snohomish County's Motion for Reconsideration, May 4, 2011.
[3] May 4, 2011, letter from John Moffat.
[4] FDO, at 25-26
[5] Consolidated Motion for Reconsideration, at 2

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of referencing the wrong subsection "defies logic and has led to an unnecessarily harsh and unjust result in this case."[6]

Snohomish County responds: "Shoreline and SRB cite no authority to support their novel argument that a Petitioner is allowed to move for reconsideration to correct an error in their own framing of the statement of the issues."[7]

The Board understands that typographical errors occur in statutory citations and that such errors can easily be replicated in the course of a proceeding. [8] However, in the present case there were several opportunities for Petitioners to revise and hone their Legal Issue statements. More importantly, preparation of the Prehearing Brief necessarily entails reviewing and arguing the statutory basis for each Legal Issue, researching authorities as well as assembling relevant facts.[9] Petitioners had this additional opportunity to discover and correct the error, but failed to do so.

The Board finds no error of procedure or misinterpretation of fact or law in the FDO supporting reconsideration of dismissal of Legal Issue 3.

Respondent's Motion

Snohomish County moves for reconsideration of the FDO ruling on Legal Issue 8(1) and part of Legal Issue 10 requiring the County to develop and review EIS alternatives. The County alleges an "error of procedure or misinterpretation of fact or law" in the Board's determination that the City of Shoreline had standing to challenge the adequacy of EIS alternatives.[10] As additional authority, the County cites *Department of Transportation v. Public Citizen*, 541 U.S. 752, 764-65, 124 S. Ct. 2204, 159 L.Ed.2d 60 (2004), for the

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[6] Consolidated Motion for Reconsideration, at 5.
[7] County Response, at 3.
[8] See "Clerical Errors," *infra*.
[9] The Consolidated Prehearing Brief (*Shoreline IV*), at 3, states: "The Growth Management Act requires the County to adopt development regulations that are consistent with its Comprehensive Plan. RCW 36.70A.040(4)." No further legal argument or authorities are provided.
[10] Snohomish County's Motion for Reconsideration, May 4, 2011

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proposition that a litigant does not have standing to challenge the adequacy of alternatives considered if the litigant did not raise the issue in its comments under the NEPA Environmental Assessment (EA).[11] Other authorities argued by the County in its motion were considered in the FDO and, in the Board's opinion, do not warrant reconsideration.[12]

The Board looks to the Supreme Court decision in *Public Citizen* to determine whether it requires reconsideration of the City's SEPA standing in the matter before us. The issue in *Public Citizen* was whether increased cross-border Mexican truck traffic, with resulting increased emissions, was an "effect" of issuance of certain rules by DOT's Federal Motor Carrier Safety Administration.[13] The Court first addressed the respondents' failure to raise lack-of-alternatives in their EA comments:

> Persons challenging an agency's compliance with NEPA must "structure their participation so that it … alerts the agency to the [parties'] position and contentions," in order to allow the agency to give the issue meaningful consideration. None of the respondents identified in their comments any rulemaking alternatives beyond those evaluated in the EA, and none urged FMCSA to consider alternatives. Because respondents did not raise these particular objections to the EA, FMSCA was not given the opportunity to examine any proposed alternatives to determine if they were reasonably available. Respondents have therefore forfeited any objection to the EA on the ground it failed adequately to discuss potential alternatives to the proposed action. [14]

The Court then found the FMSCA rulemaking was not required to take into account emissions from increased truck traffic because the allowance of additional trucking was not within the agency's authority but was subject to Presidential action.

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[11] County Motion at 5-6. The County indicates it brought this case to the Board's attention at the Hearing on the Merits. However, it was not considered in the FDO.
[12] WAC 197-11-550, WAC 197-11-545(2), *Bothell, et al v Snohomish County,* CPSGMHB Case No. 07-3-0026c, Final Decision and Order (Sep. 17, 2007).
[13] *Public Citizen*, at 764.
[14] *Id*. at 764-765 (internal citations omitted). The Court continues: "Admittedly, the agency bears the primary responsibility to ensure that it complies with NEPA, see *ibid*., and an EA's or EIS's flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action."

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In the FDO in the present case, the Board found the City of Shoreline raised the issue of lack of SEPA alternatives in its comments on the DSEIS[15] and thus, under WAC 197-11-545(1), the City was not foreclosed from raising this SEPA violation on appeal to the Board.[16] The Board must now determine, in light of *Public Citizen*, whether its FDO ruling was an error of law.[17]

When determining the meaning and application of SEPA provisions, Washington state courts look for guidance to federal cases construing and applying analogous NEPA provisions.[18] Thus the Board must determine, first, whether the DS in the present case was the equivalent of a NEPA EA.

The *Public Citizen* Court described the EA in that case:

> Under NEPA, the CEQ regulations allow an agency to prepare a more limited document, an Environmental Assessment (EA), if the agency's proposed action neither is categorically excluded from the requirement to produce an EIS nor would clearly require the production of an EIS. The EA is to be a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]."[19]

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[15] The County asserts the FDO was based on a mistake of fact in this regard. Snohomish County's Motion to Strike, at 3. The County misreads the FDO.

[16] FDO at 54 (emphasis added, internal citations omitted): "At the outset, the County argues that Shoreline did not raise the issue of alternatives during the DSEIS scoping process and so is precluded from raising this objection now. WAC 197-11-545(1) provides:

> If a consulted agency does not respond with written comments within the time periods for commenting on environmental documents, the lead agency may assume that the consulted agency has no information relating to the potential impact of the proposal as it relates to the consulted agency's jurisdiction or special expertise. Any consulted agency that fails to submit substantive information to the lead agency *in response to a draft EIS* is thereafter barred from alleging any defect in the lead agency's compliance with Part Four of these rules.

Here Shoreline submitted written comments to the scoping notice within the time allowed (see WAC 197-11-550(1)). Shoreline *also provided substantive response to the draft EIS, including in its DSEIS comments a request for analysis of "scaled-back" alternatives*. The Board concludes Shoreline's objection is not barred."

[17] Shoreline filed Shoreline's Answer to Motion for Reconsideration, May 11, 2011. The County moved to strike portions of Shoreline's Answer as new arguments not allowed on reconsideration. County Motion to Strike, May 13, 2011. The Board notes Shoreline's "new" arguments are in rebuttal to legal authorities asserted by the County in its motion for reconsideration. Nevertheless, the Board's ruling herein is based not on Shoreline's "new" arguments but on analysis of the documents in the record and the law in the light of *Public Citizen.*

[18] *Eastlake Community Council v Roanoke Associates, Inc*., 82 Wn.2d 475, 488 n 5, 513 P.2d 36 (1973)

[19] *Public Citizen,* at 757, internal citations omitted.

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The NEPA EA briefly identifies the proposal, determines whether adverse environmental impacts are sufficiently likely to require an EIS, and if so, launches a scoping process leading to development of full environmental review, including review of indicated alternatives.[20] If the EA indicates an EIS is not required, the agency must issue a "finding of no significant impact" (FONSI).[21] Under SEPA, the lead agency first makes a threshold determination of the probability of significant adverse environmental impacts and issues a determination of non-significance (DNS) or a determination of significance (DS).[22] The SEPA DS can be a simple 2-page form[23] identifying the proposal and launching a scoping process for development of the EIS.

It appears to the Board that where a NEPA EA launches a full EIS process, it is roughly similar to a SEPA DS. The NEPA EA in *Public Citizen*, however, was analogous to a SEPA DNS; in other words, it signaled the *close* of environmental review, not the beginning. Indeed, FMCSA issued a FONSI (Finding of No Significant Impact) which terminated environmental review on the same day as its EA.[24] The issue in *Public Citizen* was whether an EIS was required at all, the Court concluding the matter was preempted by Presidential initiative. In that context, the Court ruled the respondents had waived objection to lack of alternatives by failing to raise the issue during the EA comment period.

Under SEPA, a DS signals the *beginning* of environmental review.[25] Therefore the Board must consider whether the *Public Citizen* reasoning applies. The Board notes that the DS/Scoping Notice in the case before us was a three-page document stating the County's intention to consider four separate docketing proposals, each characterized as a Future

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[20] 40 CFR 1501.7, 1501.3, 1508.9.
[21] 40 CFR 1501.4, 1508.13
[22] WAC 197-11-340 (DNS); WAC 197-11-360 (DS)
[23] WAC 197-11-980
[24] *Public Citizen,* at 762
[25] WAC 197-11-360

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Land Use Map (FLUM) designation amendment.[26] The DS identified the current plan (No Action) for Point Wells as FLUM designation "Urban Industrial" and the Proposed Action Alternative as "Urban Center."

While the DS/Scoping Notice identified comprehensive plan remapping, it did not cover the rezoning that was subsequently included in Docket XIII[27] and reviewed in the DSEIS. The DSEIS describes the Proposed Action: "Amend the GMA Comprehensive Plan FLUM from UI to UC *and change the zoning from HI to PCB*."[28] The FDO notes that both Woodway and Shoreline, and perhaps other responding agencies and individuals, are eager for the reclamation and repurposing of the polluted land at Point Wells but concerned about the limited capacity of infrastructure to support dense residential development. [29] For such parties, the scoping notice for *redesignation* to Urban Center would not trigger a request for alternatives; however, a scoping notice for *rezoning* at high-density, with the prospect of project permits vesting, was never issued. Instead, the rezoning proposal appeared in the DSEIS. On these facts, the Board concludes the City of Shoreline's request for analysis of reasonable alternatives was timely when submitted during the DSEIS comment period. The Board concludes the City of Shoreline was not foreclosed from appealing the lack of EIS alternatives in its Petition for Review.

Upon review of *Public Citizen,* the Board finds no error of law requiring reconsideration of its finding that Shoreline had standing to raise the issue of SEPA alternatives. Thus the Board declines to reconsider the FDO ruling on Legal Issue 8(1) and the part of Legal Issue 10 requiring the County to develop and review EIS alternatives.

Clerical Errors

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[26] Shoreline III Index #43, Notice of Determination of Significance, Adoption of Existing Environmental Document and Request for Comments on Scope of SEIS (undated – published 11-23-07).
[27] Shoreline III Index #52, Resolution No. 08-238, June 16, 2008.
[28] Shoreline III Index #104, DSEIS 1-2.
[29] FDO at 9-10, 28-31.

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WAC 242-02-832(2)(c) provides that a motion for reconsideration may be based upon "clerical mistakes in the final decision and order." By letter dated May 4, 2011, the County identified six clerical mistakes. No party has raised any objection to the proposed corrections. Accordingly, the Board issues a Corrected Final Decision and Order making the indicated changes.[30]

ORDER

Based upon the April 25, 2011 Final Decision and Order, the motions for reconsideration of Snohomish County, City of Shoreline and Save Richmond Beach, the briefs submitted by the parties, and having deliberated on the matter, the Board ORDERS:

1. The Board finds no error of procedure or misinterpretation of fact or law in the FDO supporting reconsideration of its dismissal of Legal Issue 3. Shoreline's and Save Richmond Beach's Consolidated Motion for Reconsideration (Shoreline IV) is **denied.**
2. The Board finds no error of law requiring reconsideration of its finding that Shoreline had standing to raise the issue of SEPA alternatives. Snohomish County's Motion for Reconsideration of the FDO ruling on Legal Issue 8(1) and the part of Legal Issue 10 requiring the County to develop and review EIS alternatives is **denied**.
3. The Board finds clerical mistakes necessitate reissuance of the FDO. A Corrected Final Decision and Order is issued on this day correcting the clerical errors noted above.

DATED this 17th day of May, 2011.

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Margaret Pageler, Board Member

- [30]P. 10, fn 38 - "GMACP/CPP" should be "GMACP/**G**PP"
- P. 20, line 7 - "Lynwood" should be "Lyn**n**wood"
- P. 26, line 8 – RCW 37.70A.040(4) should be RCW 3**6**.70A.040(4)
- P. 31, line 11 – "June, 2009" should be "June, 200**6**" [2008??? See footnote 104]
- P. 38, line 4 and p. 78, line 18 – RCW 36.70.110(3) should be RCW 36.70**A**.110(3)
- P. 71, line 4 – Ordinance 09-081 should be 09-08**0**

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David O. Earling, Board Member

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William P. Roehl, Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 and WAC 242-02-832. Pursuant to WAC 242-02-832 (3), a Board order on motion for reconsideration is not subject to a motion for reconsideration.

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